

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

WIKIMEDIA FOUNDATION, et al,)
)
Plaintiff,)
)
v.) CIVIL ACTION
)
NSA/CSS) 1:15-cv-662
)
)
Defendants.)
_____)

REPORTER'S TRANSCRIPT

MOTION HEARING

Friday, September 25, 2015

BEFORE: THE HONORABLE T.S. ELLIS, III
Presiding

APPEARANCES: PATRICK TOOMEY, ESQ.
JAMEEL JAFFER, ESQ.
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1 THE CLERK: Wikimedia Foundation, et al
2 versus NSA/CSS, et al.

3 Civil case number 1:15-cv-662.

4 THE COURT: All right.

5 Who is here on behalf of the various
6 plaintiffs in this case?

7 Why don't we begin with the counsel who is,
8 probably, by agreement and designated to take the
9 leading role on this argument on the standing issue, who
10 will that be?

11 ATTORNEY TOOMEY: That is me, your Honor.

12 Good afternoon. My name is Patrick Toomey.
13 I am here from ACLU representing the plaintiffs.

14 If you would like me to introduce my
15 colleagues, I can do that.

16 THE COURT: Yes, you may do so.

17 ATTORNEY TOOMEY: Also here with me from the
18 ACLU are Jameel Jaffer, Alex Abdo, and Ashley Gorski.

19 ATTORNEY GORSKI: Good morning, your Honor.

20 ATTORNEY TOOMEY: And just so your Honor
21 knows, our colleagues from the ACLU, Maryland, Deborah
22 Jeon and David Rocah, who are also -- have appeared in
23 the case are in the galley.

24 THE COURT: All right. What about all the
25 other -- good morning to all of you or good afternoon

1 now.

2 What about all the other plaintiffs?

3 ATTORNEY TOOMEY: We represent all the
4 plaintiffs, your Honor.

5 THE COURT: All the plaintiffs.

6 ATTORNEY TOOMEY: Yes.

7 THE COURT: Okay. Thank you.

8 Now, for the government?

9 ATTORNEY PATTON: Good afternoon, your
10 Honor.

11 Rodney Patton. I represent the NSA and all
12 of the other defendants. I am from the Department of
13 Justice.

14 Also with me at counsel table is James
15 Gilligan, from the Department of Justice; Julia Berman,
16 from the Department of Justice; and Caroline Anderson,
17 from the Department of Justice.

18 THE COURT: All right.

19 Good afternoon to all of you.

20 And you are from the Programs Branch?

21 ATTORNEY PATTON: That is correct, Your
22 Honor.

23 THE COURT: All right.

24 Let me ask Mr. Toomey. I just am serious.

25 It has nothing to do with the case. Do you have a much

1 older relative that was a student in England about
2 40 years ago, 45 years ago?

3 ATTORNEY TOOMEY: Not that I know of, your
4 Honor.

5 THE COURT: All right.

6 ATTORNEY TOOMEY: I was a student briefly
7 there, but I don't think that timeframe.

8 THE COURT: Well, I knew a student when I
9 was a student there by the name of Dan Toomey, and
10 that's not a relation?

11 ATTORNEY TOOMEY: I have several relatives
12 name Dan Toomey, but I don't believe any of them were
13 there with you.

14 THE COURT: All right.

15 Well, having covered my lack of any conflict
16 on that side, let me point out that I think one of the
17 leading lights of the Programs Branch is Ms. Jennifer
18 Ricketts, who was my second group of law clerks some
19 30 years ago.

20 But that doesn't create a conflict, as far
21 as I am concerned, but I disclosed it. I hope she is
22 doing well.

23 ATTORNEY PATTON: She is doing very well,
24 your Honor. Thank you for asking.

25 THE COURT: In fact, I have had a parade of

1 clerks go through the Programs Branch. I don't even
2 know how many of them are still even there. But I think
3 most of them have gone -- passed on that way.

4 I say "passed on" because I am eager to
5 share this. Recently a story appeared in a publication
6 expressing some disagreement with an opinion I had
7 written. That's not surprising.

8 But at published a picture of me, purporting
9 to me be with that story. The picture was of a person I
10 knew, liked, and admired, but it wasn't me.

11 It was a picture of Ed Becker, a judge of
12 the Third Circuit who past away in 2006.

13 Rumors of my passing are greatly exaggerated
14 as Twain said. But am delighted to be associated with
15 Ed Becker, even in death. He was a very interesting,
16 remarkable, and very funny man, always.

17 I recall once that he wrote an opinion
18 entirely in verse. I didn't read it. But many people
19 did. Poetry was never one of my loves.

20 All right. This is a -- you all have
21 filed -- forests have died for what you all have done.
22 It's a very interesting case.

23 Let me hear first from the defendant. I
24 have some questions to ask you. You are the movant in
25 this matter. And, so, it is your burden to persuade me.

1 This -- first of all, I want to thank every
2 one for agreeing this to hear this in Alexandria. This
3 case was, initially, filed in Maryland; and, for reasons
4 that I have disclosed to you, it was -- couldn't be
5 heard -- well, it could be heard there, but not by a
6 Maryland judge.

7 And when I was asked to take the case, I
8 communicated with counsel, and I am pleased to say that
9 you agreed to have this motion heard here, which is
10 convenient for me, and I hope not too inconvenient for
11 you.

12 Actually, one of your clients, or one of the
13 parties lives close to where I live. I don't know the
14 man. But I live near Charlottesville, Virginia. And I
15 think Rutherford does as well.

16 But, in any event, I appreciate the
17 agreement of counsel to do this here. And to the extent
18 that we do other things in this case, it will always be
19 here if by agreement. If not, then we will go to
20 Greenbelt.

21 Any counsel can raise an objection at any
22 time, and I'll go to Greenbelt. Rather not, but it
23 wouldn't be the first time I had to do something I
24 didn't want to do.

25 Now, let me ask you a couple of initial

1 questions. First, this is a case that challenges the
2 NSA's gathering of Internet data from communications.

3 It strikes me, in my occasional forays into
4 reading newspapers, other than the sports page, which
5 isn't often, that there have been a lot of these cases
6 around, and I am not so happy about doing over what
7 other people are doing.

8 Now, I am familiar with the D.C. Circuit
9 case, of course, and I am familiar with the Second
10 Circuit case, and with the Clapper case, and the Supreme
11 Court, all of which you all have talked about at great
12 length in your briefs.

13 But aren't there some other cases going on
14 in district courts around the country right now?

15 ATTORNEY PATTON: Your Honor, as an initial
16 matter, some of the cases that you referenced there
17 dealt with bulk telephony metadata program.

18 THE COURT: Oh, I know it's not the exact
19 same case.

20 ATTORNEY PATTON: So, it's not the exact
21 same program; and that is, obviously, very important in
22 terms of standing.

23 THE COURT: Yes, I understand that.

24 ATTORNEY PATTON: But there are, in fact --

25 THE COURT: All right.

1 Let me narrow it down to this. Are there
2 any ongoing cases involving a challenge to the upstream
3 collection of Internet data by the NSA?

4 ATTORNEY PATTON: Yes, there are -- there
5 is, your Honor. At least one in the Northern District
6 of California. We were counsel in that case, too.

7 The case went to summary judgment on a lot
8 of the same topics, and assumptions, and speculations as
9 are here, and the judge found that there was
10 insufficient evidence to preserve even an issue for
11 trial.

12 As a matter, he dismissed --

13 THE COURT: Was there a standing dispute in
14 that case?

15 ATTORNEY PATTON: Yes, there was, your
16 Honor. It was a standing dispute.

17 THE COURT: So, it must have gone beyond
18 standing.

19 ATTORNEY PATTON: The standing and the
20 merits were dealt with at the summary judgment stage.
21 It was a motion for summary judgment -- partial motion
22 for summary judgment by the Jewel plaintiffs on their
23 Fourth Amendment claim. And the United States, Connor,
24 cross-moved for summary judgment on that.

25 THE COURT: And who were the plaintiffs in

1 that case.

2 ATTORNEY PATTON: The plaintiffs or Jewel
3 was one plaintiff and another particular plaintiff --

4 THE COURT: So, these parties were not
5 parties.

6 ATTORNEY PATTON: These plaintiff were
7 parties to the case; that's correct.

8 THE COURT: They were.

9 ATTORNEY PATTON: Yes. So, they, basically,
10 and much the same way as the plaintiffs in this case
11 said, there has been so much information out there in
12 the public sphere since the Snowden --

13 THE COURT: Well, we will get to argument
14 about standing. I just want to focus now, very sharply,
15 on -- I have asked you the question, are there any other
16 cases that are recent or ongoing, involving a challenge
17 to the NSA's collection upstream of this Internet data.

18 And you've told me about one in California
19 that went to summary judgment. Was there a Ninth
20 Circuit appeal?

21 ATTORNEY PATTEN: So, there is a Ninth
22 Circuit appeal currently ongoing on that issue, your
23 Honor. But there is also a motion to dismiss the appeal
24 that is being heard later in October, because it was a
25 Rule 54(b).

1 THE COURT: All right.

2 And the plaintiffs here were plaintiffs
3 there as well.

4 ATTORNEY PATTON: No, that's not correct,
5 your Honor. None of the plaintiff there, to my
6 knowledge, were plaintiffs.

7 THE COURT: Am sorry. I thought you said
8 earlier, they were.

9 ATTORNEY PATTON: No. They are making the
10 same arguments.

11 THE COURT: Oh, making the same arguments.

12 ATTORNEY PATTON: Making the same arguments.

13 THE COURT: All right.

14 ATTORNEY PATTON: The plaintiffs here.

15 THE COURT: All right.

16 Apart from the California case, any other?

17 ATTORNEY PATTON: I am not aware of any
18 others on the civil side. Obviously, on the criminal
19 side, there is a Hasbarjrami case that, I think, the
20 ACLU filed an amicus brief on that, in that particular
21 case, challenging both upstream and PRISM.

22 So, but, as far as civil cases are
23 concerned, I am not aware of any other upstream
24 challenge other than this one and the one in the
25 Northern District of California.

1 THE COURT: All right.

2 ATTORNEY PATTON: And there are other civil
3 actions under Section 702, but those are all PRISM cases
4 challenging a different program.

5 THE COURT: All right.

6 Now, the second question I want to ask you
7 is -- well, no, I'll make it the third, because the
8 second question I am going to ask you is probably going
9 to take longer.

10 So, I'll ask another question first. I take
11 it that at some point in time, or points in time, the
12 data collection that the NSA is undertaking that is
13 being challenged in this case went to the FISC -- went
14 to the Foreign Intelligence Surveillance Court, and an
15 order issued.

16 ATTORNEY PATTON: That's correct, your
17 Honor. The process works under Section 702.

18 THE COURT: Right.

19 ATTORNEY PATTON: The Attorney General and
20 the --

21 THE COURT: But there is, usually, an order
22 and an opinion sometimes with it. Did that occur? And
23 the reason I know that is that I have had a number of
24 classified information cases here. We get cases of that
25 sort here, and I have had to consider those orders and

1 those opinions.

2 Most of them have been -- most of them,
3 there only have been two or three -- have been
4 classified.

5 Is there a public order or opinion in --
6 that relates to the data collection practices challenged
7 here?

8 ATTORNEY PATTON: I don't believe there is
9 an unclassified opinion.

10 THE COURT: But there would have to be a
11 classified order and/or opinion; is that right?

12 ATTORNEY PATTON: Certainly a classified
13 order because --

14 THE COURT: All right.

15 ATTORNEY PATTON: -- FISC has to approve
16 both the certification coming from the Attorney General
17 and the Director of National Intelligence --

18 THE COURT: So --

19 ATTORNEY PATTON: -- plus their targeting
20 procedures and minimization procedures.

21 THE COURT: So, let me continue for just a
22 moment and ask you, what, if any effect, should the
23 existence of such an order have on the challenge by the
24 plaintiffs in this case?

25 ATTORNEY PATTON: For purposes of them being

1 able to prove their standing, I don't believe it has
2 any. For purposes of, if this case goes to the merits,
3 I think it has a significant impact on it because -

4 THE COURT: All right.

5 ATTORNEY PATTON: -- the FISC has to prove
6 the reasonableness of the program under the Fourth
7 Amendment that's under the statute. And both the --

8 THE COURT: So, it would be akin to
9 something like the existence of a search warrant in a
10 case challenging the legality of the search.

11 The court would still have to assess whether
12 the search was legal, and defects in the search warrant,
13 or the affidavits, or whatever, would have to be
14 examined.

15 All right. Let's go to the third question,
16 which really leads into what's at issue today. The
17 first two questions I asked really don't have much to do
18 with what's before the court today.

19 The Clapper case is a case that you rely on
20 quite significantly. Now, what -- and that was upstream
21 collection data, was it not?

22 ATTORNEY PATTON: That was Section 702,
23 which authorizes upstream selection and authorizes
24 PRISM. But it was a facial challenge brought, in fact,
25 by six of the nine plaintiffs here, a facial challenge

1 to the statute that authorizes this very program.

2 THE COURT: Now, what -- and, of course,
3 Clapper held there was no standing in a divided court.

4 ATTORNEY PATTON: Well, divided in the sense
5 that it was five, four. But, yes, the majority ruled
6 that there were no standing for the same reason --

7 THE COURT: Yes.

8 ATTORNEY PATTON: -- were pending in this
9 case.

10 THE COURT: Now, I want to know -- and I am
11 going to ask this of the -- of you, Mr. Toomey.

12 What is there in this second or amended
13 complaint that is different from or in addition to the
14 facts that were alleged in Clapper?

15 And I ask that for an obvious reason. And
16 that is, that if the facts in this case are exactly the
17 same as Clapper, no different from Clapper, then I don't
18 know that I have the authority to reach any different
19 conclusion.

20 So, I want to know whether, chiefly from
21 you, Mr. Toomey, what is alleged in this case that is
22 different from or in addition to what was alleged in
23 Clapper.

24 ATTORNEY PATTON: Your Honor, if I may
25 answer that question as quickly as I possible, because

1 there are, obviously, a lot of things that are alleged.

2 But the bottom line here is that in Clapper
3 the Supreme Court ruled that the plaintiffs in that case
4 could only speculate and make assumptions about who the
5 targets were.

6 Here the same kind of speculations and
7 assumptions have to albeit, by these plaintiffs, as to
8 whether or not their communications were intercepted.
9 So, it's only slightly different, but it's the
10 speculation on the assumptions that's key.

11 And here, whether -- whether anyone that
12 these plaintiffs are talking to is a target, classified.
13 Whether, what the scope of upstream collection is, how
14 it actually operates, classified.

15 So, the only things that the plaintiffs can
16 do, as set aside and throw against the wall, as much
17 information as they can taken from this snippet or that
18 snippet, but the bottom line is, they have to say, you
19 must be collecting this. It's speculation. You've got
20 to do it in this way in order to be effective.

21 And the D.C. Circuit through Judge Sentelle
22 and Judge Williams, just last month, looked at albeit
23 the bulk telephony metadata program in that case, and
24 said that's not enough.

25 When you are looking at a program and

1 saying, well, in order to be effective as a bulb
2 telephony metadata, you must be collecting from Verizon
3 wireless. That's just one piece of speculation. And I
4 know that we are going to hear from the plaintiff about
5 a chain of speculation in Amnesty and that there is not
6 as long a chain here. The point is, it's still
7 speculation.

8 And one case of speculation was sufficient
9 for the D.C. Circuit to say, you've not shown standing
10 in that case. That was one of the cases that your Honor
11 alluded to earlier.

12 And the point is, the plaintiff in that case
13 could not say, following Amnesty, that just because we
14 think the program would be effective, only if you had
15 Verizon wireless, that we can presume that Verizon is
16 part of the program.

17 Here, plaintiffs make the same arguments.
18 We presume it has to be substantially all because,
19 otherwise, how could you do this, or how could you do
20 that?

21 And, of course, the point is how the program
22 operates is classified. There are very few pieces of
23 information out there in the public. There is Privacy
24 and Civil Liberties Oversight Board. There are some
25 FISC opinions. I recommend 2011 FISC opinion from

1 October 3rd of that year by Judge Bates, which explains
2 a lot about this program. But what it doesn't explain
3 is the scope of the program, the operational details of
4 how it works. Those were classified, and they are still
5 classified.

6 So, plaintiffs, they will tell you a lot of
7 things together, and their words would be, they must be
8 doing this. To be effective, they must do this. Those
9 are all speculative words. They are all assumptions
10 that the plaintiff make.

11 So, notwithstanding the pieces of
12 information that have come out, official acknowledgement
13 since the Snowden leaks that occurred, nothing that has
14 come out as an official acknowledgement has indicated in
15 anyway the scope of this program or how it works.

16 The plaintiff are left to speculate. That's
17 exactly what the Supreme Court said they can't do in
18 order to show standing on page 1148 of the Clapper
19 versus Amnesty opinion.

20 So, we submit this case is not that
21 difficult, notwithstanding the forest that we killed to
22 prove the point to you, is that plaintiffs, two years
23 later, cannot get any further than the -- six of the
24 same plaintiffs did in Clapper versus Amnesty
25 International.

1 THE COURT: I take it you would not contest
2 standing if the plaintiffs adduced an e-mail of theirs
3 that they got from Snowden saying he got it from NSA.

4 ATTORNEY PATTON: That would be very fact
5 specific, your Honor. Obviously --

6 THE COURT: And then it would be the
7 credibility of Snowden.

8 ATTORNEY TOOMEY: Well, I am certainly not
9 going to address that. But what I will address is
10 official acknowledgments, for example --

11 THE COURT: Well, I think, what my question
12 really was is how in the world does the plaintiff in
13 this situation show standing other than by inference and
14 probabilities?

15 ATTORNEY PATTON: Well, your Honor, that
16 certainly a problem that the plaintiffs at Amnesty
17 International had. And, as I alluded earlier, the ACLU
18 on behalf of Mr. Hasbarjrami, he received an official
19 notice, not specific to upstream collection or PRISM,
20 but a 702 notice that the parties have discussed in
21 their papers. And so they briefed that issue of the
22 legality of Section 702 upstream and PRISM, and so those
23 issues were briefed.

24 If some plaintiff came forward with evidence
25 that they had, in fact, being -- their communications

1 being intercepted, then certainly we would look at that
2 and the facts of that case.

3 THE COURT: How in the world would they get
4 that evidence?

5 ATTORNEY PATTON: Well, that's -- that's one
6 of the features of a classified program. It's not a bug
7 of a classified program that it's hard to prove
8 standing.

9 THE COURT: Yes. And you couldn't and
10 shouldn't tell me how they could get that because you
11 would be revealing, if you knew --

12 ATTORNEY PATTON: Right.

13 THE COURT: -- classified information.

14 ATTORNEY PATTON: That's correct.

15 THE COURT: I am just making the observation
16 that, I am sure, was apparent to the Supreme Court in
17 Clapper that this is a significant, very difficult
18 burden for a plaintiff that they are setting.

19 And in one of -- life is full of ironies. I
20 believe Justice Breyer was an author of either Iqbal or
21 Twombly. I don't remember which one.

22 Which one was anti-trust case?

23 ATTORNEY PATTON: I think they were both
24 anti-trust case.

25 THE COURT: Well, one of the --

1 ATTORNEY PATTON: Twombly, I am sorry.

2 Twombly was anti-trust case.

3 THE COURT: I think Breyer authored Twombly;
4 and, of course, he doesn't -- he is not happy with its
5 application, as the majority put it in this case. Just
6 an irony that I -- I am increasingly amused by in life.
7 There are lots of them in everyone's lives.

8 I think I understand the parties' arguments.
9 Let's do this. You'll have the last word. You are the
10 movant. But let me ask Mr. Toomey to tell me. And pay
11 attention to this because this is one of the things that
12 I do want you to respond to.

13 My first question to Mr. Toomey is the
14 obvious one. What has been alleged in this case that is
15 different from or in addition to what was found to be
16 insufficient in Clapper?

17 ATTORNEY TOOMEY: Of course, your Honor.

18 There are four reasons.

19 THE COURT: I am sure that's a question you
20 anticipated.

21 ATTORNEY TOOMEY: We had an idea you might
22 ask it, your Honor.

23 THE COURT: All right.

24 ATTORNEY TOOMEY: There are four basic
25 reasons this case is not foreclosed by Amnesty

1 International, your Honor.

2 And if I can just describe in each briefly
3 and then get into more detail, if you you want to go
4 further. The first reason is that this surveillance is
5 fundamentally different from the surveillance that was
6 at issue in Clapper.

7 The surveillance at issue in Clapper
8 concerns what the Supreme Court understood to be
9 targeted surveillance, surveillance that was directed at
10 the communications to or from the government's foreign
11 targets.

12 The surveillance that has been disclosed
13 now, and officially acknowledged by the government, is
14 far broader than that. It involves, in the first
15 instance, this screening, as the government calls it,
16 and as we refer to it, the copying and reviewing of,
17 essentially, everyone's communications, targets and
18 non-targets alike, in search of certain terms that are
19 associated with the government's targets.

20 So, to put it maybe more simply, your Honor,
21 to put in terms of physical mail, for instance. If the
22 government wanted to collect mail from its -- from just
23 its targets, it could look at the outside of the
24 envelope and say, I'll take this letter and that letter.

25 If the government wanted to find the letters

1 containing the e-mail address or the name of a target,
2 it would have to look at the content of every letter
3 coming through, you know, the postal screening service
4 in order to find the communications that it was looking
5 for.

6 And that's very important to know about what
7 this surveillance entails. And it was not before the
8 Supreme Court in Clapper, precisely, because, as others
9 have observed since, the government did not inform the
10 Supreme Court that that was how some of the surveillance
11 was being conducted.

12 The second difference, your Honor, is that
13 far, far more is known -- is now known about the
14 surveillance than was known at the time of Clapper.

15 And the PCLOB report makes this point
16 explicitly. And we, we identified that statement in
17 paragraph 51 of our amended complaint, that at the time
18 Clapper was decided and, in fact, when the statute was
19 passed, no one in the public or the Supreme Court
20 understood the surveillance to operate in this way; that
21 is, to be this broad net looking at the content of all
22 the transiting communications, as opposed to merely
23 being focused on the communications of targets.

24 And we have pointed to numerous other
25 official disclosed -- disclosed documents that showed

1 this. We don't have the FISC order in the terms that,
2 perhaps, you were asking before that authorizes this
3 surveillance.

4 But we certainly have FISC opinions that you
5 can find on Westlaw, in fact, that describe the
6 surveillance at issue, that describe upstream
7 surveillance. And one of those opinions is an opinion
8 from Judge Bates from October 2011, where he found
9 certain of the procedures that govern upstream
10 surveillance unconstitutional.

11 And there are other opinions out there that
12 are also touching surveillance that have been released
13 by the government. So, the record that the court has
14 before if today about how this surveillance operates,
15 the government says everything about how this
16 surveillance operates is classified. Well, that's not
17 true.

18 The PCLOB report describes in a number of
19 ways how this surveillance operates.

20 THE COURT: What report?

21 ATTORNEY TOOMEY: The PCLOB report, your
22 Honor. That's the Privacy and Civil Liberties Oversight
23 Board report. It's a 196-page report that evaluates the
24 government's surveillance activities under Section 702.

25 It describes upstream surveillance in

1 significant detail, and many of the key points are
2 identified, both in our briefs, and in our amended
3 complaint.

4 The third difference from Amnesty is that
5 the plaintiff are different, not merely in their name,
6 your Honor, but in terms of how they communicate and the
7 volume and distribution of their communications.

8 We have pointed, specifically, to
9 Wikimedia's communications. It engages in more than
10 trillion Internet communications, international Internet
11 communications each year with individuals in every
12 country on earth.

13 No -- none of the plaintiffs in Amnesty put
14 that record before the court. And we've also put before
15 the court a member of NACDL, Mr. Dratel, whose clients
16 received an FAA notice. In other words, whose client
17 was told that the government used FAA surveillance to
18 intercept --

19 THE COURT: Say that last again, please.

20 ATTORNEY TOOMEY: Say which part again, the
21 last part?

22 ATTORNEY TOOMEY: Mr. Dratel's client
23 received a notice from the government, an official
24 notice, that his communications were intercepted using
25 FAA surveillance.

1 And Mr. Dratel had a second client whose
2 investigation involves a co-defendant, who also
3 government officials have described in testimony using
4 FAA surveillance.

5 THE COURT: That just shows that those
6 particular communications were gathered. And for all we
7 know, those persons' clients were designated terrorists
8 overseas, right?

9 ATTORNEY TOOMEY: The lawyers' clients were
10 individuals here in the U.S.

11 THE COURT: But were they -- certainly, if
12 they were people they were communicating with were
13 terrorists, that wouldn't be a problem,
14 Constitutionally, would it, if they were communicating
15 overseas and there was a FISC court order that permitted
16 it.

17 ATTORNEY TOOMEY: Our argument here, your
18 Honor, is that the facts that --

19 THE COURT: Can you say yes or no and then
20 answer my question, and then go to explain it. It's
21 frustrating when I ask a question, and I -- this isn't
22 politics. This isn't -- you are not on the stump. It's
23 better to give me a direct answer.

24 If the person who received these notices was
25 communicating, or not the person receiving notice, but

1 the client was communicating with someone who was a
2 designated terrorist or something of that sort overseas,
3 then nothing constitutional -- unconstitutional about
4 that if there is a FISC order, is there?

5 ATTORNEY TOOMEY: We think there is
6 something unconstitutional with that, your Honor.
7 That's not the issue here right now.

8 To be very clear about the type of FISC
9 orders that are involved in Section 702 surveillance,
10 they are not individualized warrants or individualized
11 orders finding probable cause of the same kind, as what
12 we refer to as a traditional FISC order.

13 They are the FISC orders that apply to this
14 surveillance part, general orders authorizing and
15 approving the procedures that the government proposes to
16 follow.

17 The government never identifies through the
18 court its particular targets. And, in fact, those
19 targets do not need to be designated terrorists at all.
20 They could -- they can be any foreigner located abroad,
21 any person who the government believes has -- is likely
22 to communicate information with foreign intelligence
23 value to it. It could be journalists. It could be
24 human rights activists. It could be academics. It
25 could be individuals who work at companies abroad.

1 So, I just want to be very careful to
2 distinguish between what -- what the traditional FISC
3 process required, which was and had done an
4 individualized order, and the surveillance at issue here
5 in which the government is able to identify 92,000
6 targets, foreign targets, under a single FISC order.

7 And we do believe that there are grave
8 constitutional problems with the government's ability to
9 do that absent some type of probable cause finding
10 required by the Fourth Amendment.

11 Back to Mr. Dratel, your Honor, because --
12 and the lawyer who has a client who received one of
13 these notices. Our argument is -- and the Supreme Court
14 made this point in Amnesty itself, the five justices in
15 the majority.

16 The court observed that an attorney whose
17 client was subject to FAA's surveillance would be able
18 to make a stronger evidentiary showing that his
19 communications had been intercepted, than the plaintiffs
20 who are before the court in Amnesty.

21 And the reason that we believe we have made
22 that this type of stronger showing here is because in
23 order to investigate a defense, in order to contact
24 witnesses abroad, when a defendant has received a
25 notice, the defendant's lawyer must reach out to

1 individuals abroad, contact key witnesses, research the
2 allegations in the indictment, and that that lawyer is
3 likely to communicate with or about the same person who
4 was targeted through the FAA surveillance.

5 So, that's why we believe the facts that Mr.
6 Dratel puts before court are very different from the
7 lawyers who were before the court in Amnesty itself.

8 But the third point is more generally that
9 Wikimedia's communications are so widely distributed
10 across the globe and so immense in number that they
11 transit all of the major Internet circuits that the
12 government is monitoring.

13 So, whichever circuits the government is
14 monitoring, our arguments is, the government must be
15 intercepting at least some of plaintiffs' Wikimedia's
16 communications.

17 The fourth point, your Honor, is that the
18 legal standard in this case is different from the legal
19 standards in amnesty. We are here, of course, on a
20 motion to dismiss. The government says the legal
21 standard is plausibility.

22 In Amnesty, the parties were before the
23 court on a motion for summary judgment. And the Supreme
24 Court has emphasized in a number of different places and
25 a number of different ways that what a party is required

1 to put forward at the pleading stage is different than
2 what a party must put forward at the summary judgment
3 stage.

4 So, those are the main four categories in
5 which we think this case is very different from Amnesty.
6 You can also see this in concrete way by comparing the
7 facts of this case to contingencies that Justice Alito
8 identified on page 1148 of the court's opinion.

9 First he said -- you know, he said that the
10 court was considering a set of contingencies that the
11 plaintiff was putting forward. The first of them was
12 that the government would target the plaintiffs'
13 contacts.

14 Now, the surveillance -- because the
15 surveillance here is different, because it involves
16 examining the content of, essentially, everyone's
17 targets and non-targets communications, the fact that
18 the surveillance implicates plaintiff doesn't depend on
19 whether the government is surveilling plaintiff's
20 individual context.

21 Second, the second contingencies that
22 Justice Alito identified was that government would
23 choose to use FAA surveillance.

24 But, of course, the government has
25 officially disclosed that it is using upstream

1 surveillance; and the PCLOB, the Privacy and Civil
2 Liberties Oversight Board, has described that
3 surveillance, and it has been described in another
4 number of other context by the government.

5 Third, justice Alito said that the
6 plaintiffs in that case could not know whether the FISC
7 had approved the surveillance. But, of course, here we
8 know that for a fact that the FISC had approved the
9 surveillance.

10 The government just told you that and, of
11 course, it is reflected in the materials that we cited
12 in the paper and in the amended complaint.

13 And, fourth, the Court said that plaintiffs
14 were speculating about whether the surveillance would
15 implicate their communications.

16 But we have put forward facts showing that
17 this surveillance implicates the plaintiffs'
18 communications. We have alleged first that the
19 government is intercepting, it's copying, and reviewing
20 substantially all international communications,
21 including those of plaintiffs; and second, even if that
22 were not enough, we have alleged facts showing that the
23 government is copying and reviewing at least some of the
24 plaintiffs' trillion or more communications each year.

25 And that showing, I want to emphasize, we

1 are saying to a virtual certainty that the government,
2 in order to carry out upstream surveillance, must be
3 copying and reviewing at least some of the plaintiffs'
4 communications.

5 We say that based on three factual premises,
6 your Honor. First, the facts that the government,
7 itself, has acknowledged about how upstream surveillance
8 operates.

9 The PCLOB has described -- the Privacy and
10 Civil Liberties Board has described in analyzing
11 precisely this type of surveillance, the use of
12 surveillance devices that examine the content of all
13 communications transiting that device.

14 And it has put forward even more detailed
15 description about how the government's review of the
16 contents of communications requires it to access, not
17 just the communications of targets, but the
18 communications of others.

19 Second, we have appointed to the volume and
20 distribution of plaintiff Wikimedia's communications.
21 The fact that Wikimedia's communications are so numerous
22 and spread across the globe that they transit every
23 major Internet circuit entering and leaving the country.

24 And third, we have pointed to technological
25 requirements of -- for conducting this type of

1 surveillance. And we have explained those technological
2 requirements and the structure of Internet
3 communications in great detail in our papers.

4 And those -- those technological
5 requirements are consistent with the analysis of
6 computer experts that are cited in the New York Times
7 article that we also rely upon which says, based on
8 interviews with government officials, review of NSA
9 documents, and conversations and -- conversations with
10 computer scientists that in order to carry out this type
11 of surveillance the government would have to be copying
12 and reassembling, essentially, all the tiny packets that
13 are flowing in the stream of data in order to review and
14 identify the communications of its 92,000 individual
15 targets that are spread across the globe.

16 And we believe we can make this showing,
17 your Honor, on the basis of information that's in the
18 public record. But, of course, we have also pointed the
19 court to materials that corroborate plaintiffs' showing
20 on these points that show that the government is
21 conducting the surveillance at many choke points and
22 that it has identified and pointed to plaintiff,
23 Wikimedia's, own communications in connection with
24 upstream surveillance.

25 THE COURT: All right.

1 Thank you.

2 ATTORNEY TOOMEY: Do you have any further
3 questions, your Honor?

4 THE COURT: No, thank you.

5 You will have the last word. But I want you
6 to respond, specifically, to what Mr. Toomey has said.
7 He went through -- he counted four. I counted five
8 differences between -- that he contends exist between
9 this and the information available in Clapper.

10 ATTORNEY PATTON: Yes, your Honor. I am
11 happy to walk through them all. The first one that I
12 wrote down was that the -- what we have here, upstream
13 collection, is "fundamentally different" than Section
14 702 that was at issue in Clapper.

15 First of all Clapper versus Amnesty
16 International involved 702. 702 has upstream and PRISM.
17 What wasn't public at the time was that upstream
18 collection includes to, from, and about with regard to
19 Internet communications.

20 What does "about" mean? The plaintiffs used
21 this phrase as if talking about Rodney Patton was a
22 target, that if they sent an e-mail with Rodney Patton
23 in it, that that will show up and that's something that
24 would be captured. That's not correct.

25 "About" relates to the specific

1 communications identifier, such as an e-mail address.

2 So, in the context of an about communications, so the
3 about could appear in the header or appear in the body.

4 If you want to know more about making a
5 bomb, contact following e-mail. That is an about
6 communication.

7 The most critical point, I think, that the
8 plaintiffs make in their first point is, and they keep
9 repeating it throughout is that we are copying,
10 essentially, everyone's communications, essentially
11 everyone's international communications.

12 That's not well pled under Iqbal at all.
13 That's their conclusion. Any factual enhancement that
14 they have suggested to support that, doesn't.

15 Mr. Toomey refers to the PCLOB report, for
16 example, and there are plenty of facts about the
17 upstream collection in this program.

18 What there isn't is any discussion about its
19 scope and operational details. I want to give you one
20 example that they cite to demonstrate that is,
21 essentially, everyone's communications. That's page
22 111, note 476.

23 "The NSA's upstream collection may require
24 access to a larger body of international communications
25 than those that contained a tasked selector." May

1 require access to a larger body. How big, how small is
2 that? PCLOB doesn't say, nor does the FISC opinion that
3 both the plaintiffs and the defendants have cited and
4 referenced to you today.

5 And that the FISC opinion talks about nine
6 percent of the 702 collection being related to upstream
7 and 91 percent being related to PRISM. That was in
8 2011.

9 That doesn't tell you anything about the
10 extent and scope of whether, essentially, everyone's
11 communications were copied. The same is true on the
12 ODNI report.

13 The Office of Director of National
14 Intelligence report, where it referenced there are over
15 92,000 targets for 702. How many are PRISM? How many
16 are upstream? You are left to guess.

17 There is the Charlie Savage article from the
18 New York Times in 2013. Again, media speculation about
19 the extent. There is no actual knowledge in there.

20 In fact, the PCLOB report references this
21 particular article on page 119 and with reference to
22 about collection, says that that article misunderstands
23 the more complex reality.

24 And that's the problem with speculation, of
25 course, is that you don't understand what is, actually,

1 going on. There is reference to their technical
2 capacity. Of course, under Iqbal, if you have the
3 technical capacity to do something, that doesn't mean
4 you are doing it. It is, consistency, as Iqbal pointed
5 and Twombly pointed out, is not enough.

6 There are a limited number of choke points
7 they indicated. 49, I think, is the number they used.
8 But that number doesn't mean one thing or another with
9 regard to how much of that the NSA is monitoring.

10 The purported slide that is on paragraph 68,
11 I think, of their complaint, we can neither confirm nor
12 deny its authenticity. But even if it's correct doesn't
13 support the proposition that they want this court to
14 draw from it.

15 It indicates or purports to indicate that
16 there is coverage on some, but that doesn't mean all.
17 So, the bottom line there is, with regard to it being
18 fundamentally different, it is not.

19 And then far -- their second point, which I
20 have, obviously, touched on here, is that far more is
21 known about it. I have walked through the PCLOB report
22 and FISC opinion. And this I could talk a lot about,
23 this next point, but I will spare you all of the
24 details.

25 The plaintiffs are different. Well, eight

1 out of the nine plaintiffs are not different. Eight out
2 of the nine plaintiffs are pretty much the same as the
3 plaintiffs in Clapper versus Amnesty International.

4 The one that is different here, they say is,
5 Wikimedia. Why? They have a huge volume of
6 communications, they said, distributed throughout the
7 world.

8 These communications, of course, are someone
9 like -- someone from France logging on and looking up a
10 Wikimedia website. That's a communication here. They
11 have over a trillion of those, they say.

12 Well --

13 THE COURT: Their counting of the trillion
14 is subject to some dispute.

15 ATTORNEY PATTON: It is subject to some
16 dispute.

17 THE COURT: Put it to one side, because it
18 is a large number, they are counting every little bit.

19 ATTORNEY PATTON: Well, what they are
20 counting are http requests. And, as our expert pointed
21 out, http request for a Wikimedia article is a lot fewer
22 than, say, if you are going on FISC, both because http
23 requests would get more, the more complicated the
24 graphics and the adds, and there are no adds on Wiki
25 cites, and there are not as many graphics.

1 So, even that one trillion number is
2 comparing apples to oranges in terms of the website
3 visits that we've looked at and the web page views.

4 So, if you look at Wiki's web page views,
5 though, and you compare just that for all the Wiki cites
6 that they have -- I think it was 255 billion per year,
7 it actually amounts to, when you combine just the
8 e-mails that traverse the world, and the top 50
9 websites -- top 50 out of 244 million active websites
10 out there. It's still 0.29 percent.

11 So, the terms of volume, the numbers seem
12 staggering until you put it in context. They didn't put
13 it in context, and we have done that here.

14 Plaintiffs talked about Mr. Dratel and Mr.
15 Dratel's clients. Mr. Dratel's clients received a
16 notice of Section 702 surveillance, that their case
17 involved that.

18 What they didn't get was, is it an upstream
19 case. So, he has to speculate, well, was it an upstream
20 surveillance? Was it a PRISM surveillance? They are
21 not told.

22 So, what they do in those criminal cases is
23 they brief the legality of both. But that's fine for
24 them to do in a criminal case. But here they need to
25 show something more than just a mere possibility --

1 could have been that, could have been this. You decide.
2 That's the mere possibility under Iqbal standards.

3 Again, when talking about this, he -- the
4 plaintiffs indicated that there is a virtual certainty
5 that we must be intercepting, and those are those
6 speculative words.

7 Once you are here you, must be doing
8 something. They must be doing this to make it
9 effective. That's the words of speculation from page
10 1140 of the Clapper versus Amnesty International that
11 says, "Assumptions and speculations are not enough."

12 Mr. Toomey mentioned the legal standard, and
13 we are here on the motion to dismiss. We are here on an
14 motion to dismiss. But we are here on an unusual sort
15 of framework because some of the allegations have been
16 attacked under the plausibility standard under Iqbal
17 like the substantially all. There is no plausible
18 allegation in there supporting that.

19 But they are also -- the government has
20 attacked the factual underpinning of many of their
21 allegations, including the key one that is a virtual
22 certainty that volume, for example, demonstrates that
23 Wikimedia has standing or that if you are on one cable
24 you must be collecting all of that. That's not true as
25 a matter of technology, and our expert pointed that out.

1 So, even if we are on one cable, that
2 doesn't mean that all communications on that cable are
3 subject to interception. That's the takeaway.

4 But those kinds of factual disputes put the
5 factual burden on the plaintiffs to show, by a
6 preponderance of the evidence, and your Honor can see
7 that in United States ex rel. Vuyyuru versus Jadhav.
8 And I probably have the cite here, 555 F.3d 337 at page
9 337. That's a Fourth Circuit case from 2009.

10 So, from the perspective of the legal
11 standard, yes, there is a little difference because it
12 was up on summary judgment at that time in front of
13 Clapper. But up on summary judgment, the court find
14 there wasn't even a genuine issue of material fact to
15 take beyond summary judgment from Clapper.

16 In fact, there are cases that this argument
17 started out talking about Jewel versus NSA in the
18 Northern District of California. Same result.

19 This is the Clapper case versus Amnesty
20 International both 702, this case and the Jewel case
21 involved 702, but upstream collection specifically.

22 THE COURT: Clapper went on summary
23 judgment. I take it in -- at the dismissal stage in
24 Clapper, there was an objection to the plaintiff's
25 standing.

1 ATTORNEY PATTON: I believe -- I believe it
2 went to -- Mr. Capilano, who was here earlier was --
3 handled that case on behalf of United States.

4 THE COURT: I'm sorry. Say that again,
5 please, sir.

6 ATTORNEY PATTON: I am afraid I was not on
7 that case. I believe Mr. Jaffer was from ACLU. But my
8 recollection of the procedural posture was that that
9 case went directly to merits briefing. That's correct.
10 And so it was summary judgment brief. And there was no
11 opportunity, like there is here, for your Honor to
12 dismiss this case without going forward to the merits
13 and whatever could happen at the merits stage.

14 THE COURT: All right.

15 Thank you.

16 ATTORNEY PATTON: Thank you. I have much
17 more I could say, but there is a lot of information in
18 the briefs.

19 THE COURT: You don't get the last word.
20 You are not the movant.

21 ATTORNEY TOOMEY: I understand, your Honor.
22 I had hoped that we could say something about the
23 procedural posture of the case.

24 THE COURT: All right. Go ahead. And then
25 I'll give you the last word, because you are the movant;

1 and, otherwise, it's interminable, and it's lunch time.

2 ATTORNEY TOOMEY: I understand, your Honor.

3 The government just explained that it now views its case
4 as both a facial attack on the complaint and a factual
5 attack on the complaint.

6 And I want to explain and make very clear, I
7 hope, to the court why the government is trying to have
8 it both ways, and why that's inappropriate at this stage
9 of the case.

10 The government is trying to have the benefit
11 to prevail on a motion to dismiss, using evidence that
12 it's only entitled to the merits. And there are three
13 reasons, if I can describe those for the court.

14 The first is that Fourth Circuit has made
15 very clear, including in a case the government just
16 cited to you that when the factual issue in dispute is
17 inextricably intertwined with the merits, it can only be
18 resolved on the merits under Rule 56. And that's not
19 what the government is proposing to do here.

20 The fact of whether the government is
21 copying and reviewing the plaintiffs' communications,
22 obviously, is closely related, if not an essential
23 element of plaintiffs showing that the government is
24 unlawfully searching and seizing their communications.

25 It would be like a plaintiff suing over an

1 illegal house search, and the government saying, as a
2 jurisdictional matter, we want you to prove that your
3 house was searched and how it violated your privacy
4 under Rule 12(b)(1).

5 And the Fourth Circuit's decisions in
6 Kearns, in United States versus North Carolina, in
7 Vuyyuru, which is a case the government just cited, and
8 in Adams, all show to the contrary, that this factual
9 dispute can only be resolved on the merits.

10 The second point is that the government
11 didn't present --

12 THE COURT: It isn't a factual dispute.
13 It's a dispute about whether the allegations in the
14 complaint, the amended complaint, are sufficient to
15 raise a plausible inference that your clients'
16 communications were seized and copied. That's what is
17 it at the threshold.

18 ATTORNEY TOOMEY: We entirely agree with
19 that, your Honor. And our --

20 THE COURT: If we get into the facts and --
21 I think I -- you may be seated.

22 Let me ask the government. You don't intend
23 to make it a factual determination, do you?

24 ATTORNEY TOOMEY: There is a portion of the
25 motion to dismiss that we filed, and Mr. Toomey

1 mentioned that I just explained.

2 We explained this situation, what was
3 happening in our reply brief, as to what -- because they
4 not moved to strike, but indicated that it was improper
5 for us to add documents outside the pleadings, the two
6 expert declarations, for example.

7 But for the substantially all-allegation,
8 that is, clearly, unsupported by any well-pled
9 allegations in the complaint. As your Honor mentioned,
10 it's an Iqbal plausibility determination.

11 When we get to the part of, they must -- the
12 NSA must be conducting surveillances, obviously, it's
13 speculation the say way as it was in Clapper versus
14 Amnesty.

15 But if your Honor needs to get to any
16 factual issue on that, you can also resolve that short
17 of a merits determination to decide jurisdictional
18 facts.

19 And I have heard the plaintiffs say, both in
20 their brief and here today, that the facts are
21 inextricably intertwined. But I have not heard how it
22 is. In every case you have to show standing, and in
23 every case --

24 THE COURT: Standing is a jurisdictional --

25 ATTORNEY PATTON: It's a jurisdictional

1 matter.

2 THE COURT: Just a moment. When I start,
3 you need to stop.

4 ATTORNEY PATTON: Sorry.

5 THE COURT: He gets us only one at a time
6 here, Mr. Rodriguez.

7 ATTORNEY PATTON: Too much coffee this
8 morning.

9 THE COURT: And it's a jurisdictional issue.
10 I have no power to decide the merits until I decide the
11 jurisdictional issue.

12 Only if I find standing, do I have the power
13 to adjudicate. I am not a fan of mixing standing with
14 the merits, and going ahead.

15 I am surprised that the California suit,
16 once you get past the jurisdictional aspect then, of
17 course, you get discovery. I would be surprised if
18 everybody doesn't have to get some kind of clearance to
19 look what discovery is sought.

20 And, so, I don't see this as a case
21 involving a factual dispute, do you?

22 ATTORNEY PATTON: I don't believe so.

23 THE COURT: This standing issue, I don't
24 have to resolve a factual dispute, do I?

25 ATTORNEY PATTON: As the record exists right

1 now, your Honor, I don't see -- I think we can resolve
2 this case on --

3 THE COURT: So, I don't have to look at your
4 declarations.

5 ATTORNEY PATTON: If you can decide this
6 without the declarations, we are certainly --

7 THE COURT: Well, if I have to use the
8 declarations to decide them, isn't that importing into
9 the standing?

10 Let me do this. Mr. Johnson, I am going to
11 take a recess before I hear your case, so that we can
12 have lunch.

13 ATTORNEY JOHNSON: Yes, sir.

14 THE COURT: So we wouldn't begin your case
15 until 1:30 at the earliest.

16 ATTORNEY JOHNSON: Yes, sir.

17 THE COURT: Now, your client, I think, is in
18 the custody of the marshals. If you need to see him,
19 you need to discuss that with the court security officer
20 and the marshals.

21 ATTORNEY JOHNSON: Yes, sir, I will. That
22 is what I am trying to do. I appreciate that, your
23 Honor.

24 THE COURT: Thank you, Mr. Johnson.

25 All right. So, I want to be clear, do you

1 you believe -- is it the government's position that I
2 have to resolve factual disputes, other than inferences.
3 You are going to disagree about inferences.

4 But, do I have to get into the merits, facts
5 of this, that is seizing of actual things to decide the
6 case -- decide the standing issues.

7 ATTORNEY PATTON: You do not need to --
8 that's our point is that, contrary to what the plaintiff
9 say, you do not need to get into the merits FISC facts
10 because the merit FISC facts are not inextricably
11 intertwined.

12 To the extent that at the end of all the
13 briefing you think that there are any jurisdictional
14 factual disputes, you are entitled, as a matter of law,
15 in determining your jurisdiction, to resolve those.

16 THE COURT: All right. A last question for
17 you. Other than producing an e-mail of the plaintiffs
18 that they can show was trapped, and copied, and whatever
19 by the NSA, is there any other way to get standing?

20 ATTORNEY PATTON: Certainly, if there is an
21 official acknowledgement by the United States in a
22 criminal case, if they said, we took this information
23 from you, from the upstream process, then I can envision
24 that.

25 THE COURT: But, in this context, you can't

1 think of any?

2 ATTORNEY PATTON: I can't think of any --

3 THE COURT: Other than what the --

4 ATTORNEY PATTON: -- right here, but I will
5 say that the Supreme Court -- this same argument was
6 made to the Supreme Court. And the response to the
7 Supreme Court was, just because you don't have standing,
8 and you can't think of anybody who does, there is no
9 reason to find standing in this case.

10 THE COURT: Yes, I think that's clear. But
11 no judge could decide this without thinking about that.
12 And you would not, I think, argument on behalf of the
13 government that just because you all keep things secret
14 that the constitutionality of it can't be, at some
15 point, examined and judicially determined.

16 ATTORNEY PATTON: Well, two points, your
17 Honor. The constitutionality of this program is, at
18 least, once a year examined by the Foreign Intelligence
19 Surveillance Court that has --

20 THE COURT: That's the question I asked.
21 That's the point I raised at the outset. Where are the
22 opinions and the -- from the FISC court? And the answer
23 to that was, well, they only decide the minimization
24 efforts and so forth.

25 ATTORNEY PATTON: They decide -- they have

1 to decide whether the process that's in place, the
2 minimization procedures and targeting procedures, are
3 reasonably designed to comply both with the statute,
4 Section 702, and with the Fourth Amendment, with full
5 knowledge of how, from the NSA and from the National
6 Security Division, Department of Justice, how this
7 program works, not something that we --

8 THE COURT: The only thing missing from that
9 equation is anybody arguing that it's unconstitutional.

10 ATTORNEY PATTON: Well, your Honor, as you
11 know, the USA Freedom Act was enacted just a few months
12 ago, and there are issues that are coming from that
13 about designing particular parties to argue those --

14 THE COURT: Yes.

15 ATTORNEY PATTON: -- those kinds of --

16 THE COURT: Yes.

17 ATTORNEY PATTON: -- those kinds of things.

18 But the second point is, who can make these
19 arguments. In criminal case, the ACLU is making these
20 very arguments and has made them on behalf of Mr.
21 Dratel's clients that -- that upstream collection is
22 unconstitutional, that it violates the Fourth Amendment
23 at the very least.

24 So, whether these particular plaintiffs are
25 able to demonstrate to the court's satisfaction they

1 have standing or not, these issues are being addressed
2 by article three judges.

3 THE COURT: Thank you.

4 ATTORNEY PATTON: Thank you, your Honor.

5 THE COURT: Obviously, this is an issue of
6 some complexity and importance. I think the arguments
7 today have been helpful, and I thank counsel for that.

8 The purpose of oral argument is two-fold.
9 One is to focus matters sharply, and I think this has
10 focused it reasonably sharply on issues. And the other
11 is to expose my ignorance so you could fill the empty
12 bottle, as it were, and you all have done that in your
13 briefs and now in oral argument, and I thank you.

14 Again, I thank counsel for your cooperation,
15 particularly, for your agreement to have your argument
16 here rather than at Greenbelt.

17 Court stands in recess.

18 (Court recessed at 1:03 p.m.)

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1 CERTIFICATE OF REPORTER

2

3 I, MICHAEL A. RODRIQUEZ, an Official Court
4 Reporter for the United States District Court, in the
5 Eastern District of Virginia, Alexandria Division, do
6 hereby certify that I reported by machine shorthand, in
7 my official capacity, the proceedings had and evidence
8 adduced upon the motion hearing in the case of WIKIMEDIA
9 FOUNDATION, et al vs. NSA/CSS.

10 I further certify that I was authorized and
11 did report by stenotype the proceedings and evidence in
12 said motion hearing, and that the foregoing pages,
13 numbered 1 to 52, inclusive, constitute the official
14 transcript of said proceedings as taken from my machine
15 shorthand notes.

16

17 IN WITNESS WHEREOF, I have hereto subscribed
18 my name this 1st day of October, 2015.

19

20

21 /S/
Michael A. Rodriquez, RPR/CM/RMR
22 Official Court Reporter

23

24

25

26